91-192

No.

in the
Supreme Court
of the
United States

OCTOBER TERM, 1990

RAUL Z. PLASENCIA,
MARIA E. PLASENCIA,
and
PABLO CARBALLO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the spirit and letter of a written and executed plea agreement has been violated where the government has induced the defendant to plead guilty to the least serious of several offenses charged in exchange for the promise that the more serious offenses would be dismissed "with prejudice" and the additional promise that the government would make no recommendation as to the quantity of punishment when at the sentencing hearing the prosecutor opposes the defendant's request for a specific sentence and also argues that the defendant is guilty of the more serious offenses and should be sentenced accordingly.

2. Whether violation of the Congressional requirement that state officials first obtain a federal court order prior to intercepting communications conducted on cellular telephones in a state that requires no prior judicial authorization for such interceptions mandates suppression of the communications without regard to whether the officers acted in "good faith" by first having obtained a state court order?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 921 F.2d 1557. A copy of the opinion is attached to this petition as Appendix A. The Eleventh Circuit denied rehearing on May 24, 1991. A copy of the order of denial is attached to the petition as Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was filed on January 30, 1991. The Eleventh Circuit denied rehearing on May 24, 1991. This petition for writ of certiorari followed within 90 days of the latter date. Supreme Court Rule, rule 13. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

STATUTORY PROVISIONS INVOLVED

Special Rule for State Authorizations of Interceptions, P.L. 99-508, § 111(b), provides as follows:

> Any interception pursuant to section 2516(2) of title 18 of the United States Code which would be valid and lawful without regard to the amendments made by this title [enacting sections 2521 and 3117 of this title, amending this section and sections 2232, 2511, to 2513, 2516(1)(a), (1)(c), (1)(g) to (1), (2), (3), and 2517 to 2520 of this title, and enacting provisions set out as notes under this section] shall be valid and lawful notwithstanding such amendments if such interception occurs during the period beginning on the date such amendments take effect and ending on the earlier of -
>
> (1) the day before the date of the taking effect of State law conforming the applicable State statute with

chapter 119 of title 18, United States Code, as so amended; or

(2) the date two years after the date of the enactment of this Act [October 21, 1986].

Title 18, United States Code § 2516(2) provides:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense for which application is made, when such interception may provide ... evidence of the commission of [enumerated offenses omitted] ... or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception....

STATEMENT OF THE CASE

A. Procedural History

A five-count indictment was filed in the United States District Court for the Southern District of Florida. Count one charged Petitioners Raul and Maria Plasencia with operating a continuing criminal enterprise. Petitioner Pablo Carballo, the Plasencias, and five others, were charged in count two with conspiracy to distribute cocaine and in counts three through five with possession with intent to distribute cocaine. The petitioners moved to suppress the fruits of wiretaps. Following an evidentiary hearing, the district judge denied the motion to suppress. A jury trial commenced during which the government entered into written plea agreements with the petitioners who entered guilty pleas preserving the right to appeal the district court's order denying the motion to suppress.

On January 30, 1991, the United States Court of Appeals for the Eleventh Circuit affirmed. (App.A). Rehearing and suggestion for rehearing in banc were denied on May 24, 1991. (App.B).

B. Statement of the Facts

Eugenio Esteban was found murdered in his automobile in Miami, Florida. Approximately one month later, an unknown tipster placed the first of several telephone calls to law enforcement authorities. The tipster claimed that the murder was drug-related and accused Raul Plasencia of involvement. Based upon these telephone calls, Florida prosecutors submitted an affidavit to a Florida appellate judge who authorized the wiretapping of land-line telephones located in the residence of Raul Plasencia. The state prosecutors then applied to a Florida Supreme Court Justice who authorized the tapping of cellular (mobile) telephones

used by Plasencia and others. The conversations intercepted from the cellular calls formed the crux of the prosecution.

The petitioners sought suppression of the intercepted cellular conversations claiming that the state prosecutors failed to follow the preemptive requirements of the federal wiretap statute requiring that application be made to a federal court for interceptions of cellular communications where the applicable state wiretap statute does not authorize the state prosecuting attorney to apply for such interceptions. The petitioners argued that because under Florida law, cellular communications are deemed "public" and are not protected from unauthorized interceptions, Florida law did not authorize prosecutors to apply for judicial authorization to intercept cellular communications, thereby triggering the requirements of the federal statute. The petitioners' motion to suppress was denied by the district judge and the court of appeals affirmed.

Following the denial of the motion to suppress, Raul Plasencia entered into a written plea agreement with the government. Plasencia agreed to plead guilty to count three of the indictment which charged possession with intent to distribute approximately ten kilograms of cocaine. Paragraph two of the plea agreement provided that the government would dismiss "with prejudice" the remaining counts of the indictment. In addition, paragraph nine of the plea agreement provided that the "United States agrees to make no recommendation as to the quality or quantum of punishment, but reserves the right to inform the Court of all facts pertinent to the sentencing process, as well as the right to supply the Court's probation officer with all relevant information concerning the defendant, including his background." (App.C).

At the sentencing hearing, counsel for Plasencia argued for a sentence no greater than twenty years, based upon the

charge to which Plasencia pled guilty and the sentences imposed upon codefendants for the same charge. Despite the pledge to make no recommendation concerning quantity of punishment, the prosecutor stated in the presentence report that "it is felt that a significant and lengthy term of imprisonment is warranted." (App.D). At the sentencing hearing, the prosecutor orally opposed a twenty-year sentence. Additionally, although one of the counts of the indictment which had been dismissed with prejudice charged a continuing criminal enterprise, the prosecutor argued in the presentence report and at the sentencing hearing that Plasencia should be sentenced as a "kingpin" and "for having operated a continuing criminal enterprise". (App.A at 18; App.D).

On appeal, Plasencia claimed that in opposing defense counsel's request for a sentence no greater than twenty years, the prosecutor breached the promise in the plea agreement to make no recommendation regarding the quantity of sentence. Plasencia also argued that the prosecutor violated the provision in the plea agreement that dismissed "with prejudice" all other counts (which included the charge of continuing criminal enterprise) by seeking punishment for Plasencia's alleged involvement in such an enterprise. The Eleventh Circuit found no violation of the written plea agreement. The court did not directly answer Plasencia's complaint that the prosecutor's opposition to a twenty-year sentence violated the plea agreement. With regard to the other claimed breach, the court reasoned that by reserving the right to inform the sentencing udge of all facts relevant to sentencing, the government could seek punishment for the continuing criminal enterprise despite the agreed dismissal of that charge with prejudice. Plasencia was sentenced to imprisonment for fifty years. (App.E).

REASONS FOR GRANTING THE WRIT

I.

This Court held in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) that when the government breaches an agreement either to take a specific position at sentencing or to take no position at all, the defendant is entitled to relief. This rule has been widely recognized and enforced throughout the federal and state criminal justice systems. In this case, however, the Eleventh Circuit has rendered a conflicting decision, allowing the government to seek a term of incarceration greater than that requested by defense counsel despite the government's pledge in a written plea agreement that it would make no recommendation regarding amount of incarceration. Review is sought because the decision below cannot be squared with notions of fair play and due process of law which heretofore have guided the plea-bargaining process. Review is also sought because such a decision undermines confidence in representations made by the government designed to induce guilty pleas.

Another issue of significance to the integrity of the plea-bargaining system is whether a prosecutor who induces a defendant to plead guilty to a lesser charge in exchange for dismissal "with prejudice" of the more serious charges should be allowed to argue at sentencing that the defendant is guilty of the serious charges and should be sentenced accordingly. In finding no breach of the plea agreement in this case, the Eleventh Circuit rendered a decision in conflict with decisions of this Court and other circuit courts. In allowing the government to so ambush an accused after leading him to believe that he would be sentenced for the crime to which he pled guilty rather than for the crimes dismissed "with prejudice", the decision below will have a chilling effect upon the plea-bargaining process.

II.

In 1968, Congress preempted the field of interception of wire and oral communications by enacting Title III of the Omnibus Crime Control and Safe Streets Act, Pub.L. 90-351, 82 Stat. 212 (1968) (codified at 18 U.S.C. § 2510 et seq.). Because many states made no provisions for the protection of conversations conducted on cellular telephones, Congress passed special legislation in 1986 amending the Act. The legislation provided, in pertinent part, that state law enforcement authorities could not intercept cellular communications without first obtaining a federal court order, unless the state law authorized the state's principal prosecuting attorney to make application to a state court judge for interception of cellular communications. In the case at bar, the state authorities did not apply to a federal judge for such authorization even though the state (Florida) was one which deemed cellular communications "public" and therefore not subject to any prior judicial protection. Instead, the authorities obtained an order from a state judge. The Eleventh Circuit approved this violation of the heretofore preemptive federal statutes on the ground that the state officers "were attempting to ensure" against any violation of Florida law and because "no prejudice resulted". (App.A at 8). In so holding, the Court of Appeals has disemboweled Congress' preemption of the field of communications interceptions and has engrafted upon the federal statutes a "good faith" exception to violations thereof. No such exception to violations of the federal wiretap statute has heretofore been recognized by this Court.

ARGUMENT

I.

WHERE A PLEA AGREEMENT PROVIDES (1) THAT THE GOVERNMENT WILL MAKE NO RECOMMENDATION AS TO QUANTITY OF SENTENCE AND (2) THAT IN EXCHANGE FOR A GUILTY PLEA TO A LESSER OFFENSE THE GOVERNMENT WILL DISMISS "WITH PREJUDICE" THE GREATER OFFENSES, THE PLEA AGREEMENT IS BREACHED WHERE (1) THE GOVERNMENT OPPOSES A SENTENCE PROPOSED BY DEFENSE COUNSEL AND (2) THE GOVERNMENT SEEKS PUNISHMENT FOR COMMISSION OF THE OFFENSES THAT WERE DISMISSED WITH PREJUDICE.

Well over three-fourths of the criminal convictions in this country rest upon pleas of guilty. *Mabry v. Johnson*, 467 U.S. 504, 509 n.8, 104 S.Ct. 2543, 2547 n.8, 81 L.E.2d 437 (1984), quoting *Brady v. United States*, 397 U.S. 742, 752, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970). A considerable number of those guilty pleas are obtained pursuant to plea agreements between the prosecution and the defendant. In order to preserve the integrity of the plea-bargaining process, the prosecution is deemed bound by any of its promises which have induced an accused to enter a plea of guilty. *Santobello v. New York*, *supra*. Accordingly, this Court has held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id*. Consequently, "when the prosecution breaches its promise with respect to an executed

plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand". *Mabry v. Johnson*, 467 U.S., at 509, 104 S.Ct., at 2547.

The provisions of a plea agreement are, of course, the starting point for determining whether the government has fulfilled its obligations. The courts also look to what the defendant reasonably understood when he entered his guilty plea in determining whether the government has breached the agreement. *United States v. Greenwood*, 812 F.2d 632, 635 (10th Cir.1987); *United States v. Quan*, 789 F.2d 711, 713 (9th Cir.), *cert. denied*, 478 U.S. 1033, 107 S.Ct. 16, 92 L.Ed.2d 770 (1986); *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir.1985). If the terms of the agreement are ambiguous, they are construed against the drafter. See *Innes v. Dalsheim*, 864 F.2d 974, 979 (2d Cir.1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 50, 107 L.Ed.2d 19 (1989) and cases cited.

Two provisions in the written plea agreement in the case at bar are at issue. These provisions are commonly found in written plea agreements throughout the Nation. The first provision in question states the following:

> The United States agrees to make no recommendation as to the quality or quantum of punishment, but reserves the right to inform the Court of all facts pertinent to the sentencing process, as well as the right to supply the Court's probation officer with all relevant information concerning the defendant, including his background.

(App.C).

The second provision of the written plea agreement at issue provides that in exchange for the petitioner's guilty plea to count three of the indictment, "The United States agrees

to dismiss with prejudice the remaining counts of the indictment...". (App.C at 2).

When the government agrees to assume a position with regard to sentencing, as in the first provision of the agreement quoted above, "it must carry out its part of the bargain." *United States v. Benchimol*, 471 U.S. 453, 456, 105 S.Ct. 2103, 2105, 85 L.Ed.2d 462 (1985). When the government breaches an agreement either to take a specific position at sentencing or to take no position at all, resentencing is required. *Santobello*, *supra*; *United States v. Casamento*, 887 F.2d 1141, 1180-82 (2d Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1138, 107 L.Ed.2d 1043 (1990); *United States v. Moscahlaidis*, 868 F.2d 1357, 1361 (3d Cir.1989); *Brunelle v. United States*, 864 F.2d 64, 65 (8th Cir.1988); *United States v. McCray*, 849 F.2d 304, 305 (8th Cir.1988); *United States v. Greenwood*, 812 F.2d at 635-36 (10th Cir.1987); *United States v. Brody*, 808 F.2d 944, 948 (2d Cir.1986); *United States v. Corsentino*, 685 F.2d 48, 51 (2d Cir.1982); *United States v. Crusco*, 536 F.2d 21, 26 (3d Cir.1976).

For example, in *United States v. Greenwood*, *supra*, the government agreed in its plea agreement not to seek or suggest incarceration as a means of sentencing. Immediately following defense counsel's statement on sentencing which sought a fine or suspended sentence, the prosecutor noted the defendant's lack of remorse and the need to deter others from committing similar crimes. The Tenth Circuit held, citing this Court's decisions in *Mabry* and *Santobello*, that although the prosecutor did not specifically suggest incarceration, her comments violated the government's pledge regarding incarceration and the case was remanded for resentencing or withdrawal of the plea.

In *United States v. Corsentino*, *supra*, the government promised to "take no position" at sentencing. When defense

counsel requested that sentence be imposed pursuant to 18 U.S.C. § 4205(b), the prosecutor objected. Defense counsel's request was denied and on appeal, the Second Circuit found that a "plausible interpretation" of the plea agreement was that "the Government would make no comment to the sentencing judge, either orally at sentencing or in writing prior to sentencing, that bears in any way upon the type or severity of the sentence to be imposed." 685 F.2d at 51. Therefore, the court held, the government breached its agreement when it voiced objection to imposition of the sentence pursuant to § 4205(b) and the case was remanded for resentencing before a different district judge.

In *United States v. Crusco*, *supra*, the defendant entered into a plea agreement wherein the government promised to abstain from taking a position on sentencing. After defense counsel made a plea for leniency at the sentencing hearing, the prosecutor responded with various comments regarding the defendant's role in an organized crime hierarchy, his danger to the community, and his record. Citing *Santobello*, the Third Circuit ordered the district judge to allow the defendant to withdraw his plea, finding the government had breached its promise. "We see the Government's characterization as a transparent effort to influence the severity of [the defendant's] sentence. Only a stubbornly literal mind would refuse to regard the Government's commentary as communicating a position on sentencing." 536 F.2d at 26.

In *United States v. Moscahlaidis*, *supra*, the defendant entered a plea of guilty pursuant to a written plea agreement. The government pledged not to take a position with regard to whether a custodial sentence would be imposed, but that if a custodial sentence were to be imposed, it was agreed it would not exceed one year. The government reserved the right to inform the sentencing judge of all information relevant to sentencing and to correct factual misstatements.

Prior to sentencing, the government submitted a sentencing memorandum to which the defendant objected on the ground that it violated the letter and spirit of the plea agreement and undermined the pledge that the government would not take a position relative to whether a custodial sentence should be imposed. The district judge disagreed with the defendant's characterization. On appeal, the Third Circuit found the government had violated the plea agreement, ruling that the government's reservation of the right to inform the judge of all information relevant to sentencing did not permit the comments made by the government in its sentencing memorandum which amounted to conclusions about the defendant's character. The government argued on appeal that because it had not specifically "recommended" a sentence, it had complied with the agreement. The court rejected this claim, finding a distinction between a promise not to take a position and a promise not to recommend, concluding that the promise not to recommend speaks only as to the sentence to be imposed whereas a promise to take no position speaks to no attempt at all to influence the defendant's sentence. Thus, even though the government reserved the right to provide information relevant to crimes and sentencing, the court held the statements and opinions about the defendant's character amounted to taking a position relative to whether a custodial sentence should be imposed. See also *United States v. Stemm*, 847 F.2d 636, 640 (10th Cir.1988) (Seymour, J., dissenting).

In the case at bar, when counsel for Raul Plasencia argued for a sentence no greater than twenty years, the prosecutor voiced immediate objection, arguing such a sentence would not be appropriate under the circumstances of the case. Rejecting the petitioner's claim that such opposition breached the plea agreement, the Eleventh Circuit cited that provision of the agreement which reserved to the government the right to inform the sentencing court of facts relevant to sentencing. But such a provision only speaks to

"facts" relevant to sentencing, not quantity of punishment. Nor could such a plea agreement provision excuse the government's statement in the presentence report that "it is felt that a significant and lengthy term of imprisonment is warranted." (App.D at 2). The court of appeals' interpretation of the government's right to inform nullifies any governmental promise not to address quantity of punishment. In so ruling, the Eleventh Circuit has placed itself in conflict with the decisions cited above.

The second breach of the plea agreement took place when the government requested that Plasencia be sentenced as if he had been convicted of participating in a continuing criminal enterprise. Using terms of art indigenous to the law governing continuing criminal enterprises, the government argued at the sentencing hearing and in the presentence report that Plasencia was a "kingpin", that he "operated a continuing criminal enterprise", and that he "directed, managed and supervised" persons involved in various offenses. These characterizations of the petitioner violated the spirit as well as the letter of the plea agreement provision wherein the government agreed to dismiss "with prejudice" all other counts, including the charge of continuing criminal enterprise.

In *United States v. Castro-Cervantes*, 927 F.2d 1079 (9th Cir.1991), the court held that a sentencing judge should not accept a plea bargain and then later take into account dismissed charges in calculating the sentence. Although *Castro-Cervantes* arose under the federal sentencing guidelines, the court noted that "our holding is faithful not only to the guidelines but to the fundamental concept of plea bargaining." *Id.*, at 1082. "[F]or the court to let the defendant plead to certain charges and then be penalized on charges that have, by agreement, been dismissed is not only unfair; it violates the spirit if not the letter of the bargain." *Id.*

In the case *sub judice*, the Eleventh Circuit found no such violation of either the spirit or the letter of the plea agreement, ruling instead that dismissal with prejudice "did not preclude the government from characterizing Plasencia as the ringleader or principal in the offense." (App.A at 19). Such a holding is in square conflict with *Castro-Cervantes* as well as this Court's interpretation of Rule 11(e), Federal Rules of Criminal Procedure, which rule governs plea agreement procedures and which "speaks in terms of what the parties in fact agree to, and does not suggest that ... implied-in-law terms ... have any place under the Rule." 471 U.S., at 455, 104 S.Ct., at 2105.

Although a sentencing judge need not be influenced by the government's breach in order for the defendant to be afforded relief, *Santobello*, 404 U.S., at 262, 92 S.Ct., at 495, in this case, it is apparent that Plasencia was severely prejudiced by the breaches. Although a conviction for possession with intent to distribute approximately ten kilograms of cocaine carries a national average term of imprisonment of sixty-seven months (App.D), Plasencia was sentenced to a term of imprisonment of fifty years. (App.E). Such "sandbagging" by the government must not be countenanced unless the plea-bargaining system is no longer subject to Fifth Amendment principles of due process and fair play.

II.

STATE OFFICERS' VIOLATION OF THE PREEMPTIVE FEDERAL WIRETAP STATUTES WARRANTED SUPPRESSION OF THE FRUITS OF THE VIOLATION WITHOUT REGARD TO WHETHER THE OFFICERS ACTED IN GOOD FAITH.

In 1968, Congress preempted the field of interception of wire and oral communications by enacting Title III of the Omnibus Crime Control and Safe Streets Act. P.L. 90-351, 82 Stat. 212 (1968), codified at 18 U.S.C. § 2510 et seq. In 1986, Congress enacted the "Electronic Communications Privacy Act of 1986". P.L. 99-508, 100 Stat. 1848 (1986) [ECPA]. The ECPA amended Title III to protect cellular communications from interception without prior judicial approval by changing the definition of "wire communication" to provide that an "aural transfer" transmitted in part by wire and in part by radio remains a wire communication so long as the connection between the sending and receiving phones is made in a switching station. 18 U.S.C. § 2510(1). "This ... makes clear that cellular communications - whether they are between two cellular telephones or between a cellular telephone and a 'land line' telephone - are included in the definition of 'wire communications' and are covered by the statute." Senate Report No. 99-541 at 11, 1986 U.S. Code, Cong. & Admin. News 3555, 3565.

At the time of the enactment of ECPA, many states afforded cellular communications no protections from unauthorized interceptions. For those states, Congress accompanied the ECPA with a "Special Rule", P.L. 99-508, § 111(b). The rule provides, in pertinent part, that if a state-authorized interception would be valid without regard to the new protections effected by the ECPA, the interception

would be valid notwithstanding the ECPA, but only if conducted within two years of the effective date of the ECPA and only if conducted pursuant to 18 U.S.C. § 2516(2). Section 2516(2) provides that the principal prosecuting attorney of any state may apply to a state judge for the interception of communications "if such attorney is authorized by a statute of that State" to make the application.

In the case at bar, the Florida prosecuting attorney obtained a court order from a state judge, even though under Florida law the prosecutor was not so authorized. By failing to follow the preemptive requirements of the federal wiretap statute, the state officers violated the petitioners' rights under the federal statutes as well as the Fourth Amendment guarantee against unreasonable searches and seizures and the right to privacy. See *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). An examination of two critical principles of Florida law makes this conclusion clear.

First, under Florida law, suppression of wiretap evidence is required if the order authorizing the wiretaps was obtained by a prosecutor who lacked statutory authorization. *State v. Daniels*, 389 So.2d 631 (Fla.1980). Second, the Florida wiretap statute, Chapter 934, Florida Statutes (1977), does not protect communications which can be received with the use of a "bearcat scanner." *Dorsey v. State*, 402 So.2d 1178, 1183 (Fla.1981). Because cellular communications can be intercepted with a "bearcat scanner", see *Edwards v. State Farm Insurance Company*, 833 F.2d 535, 536 (5th Cir.1987), it logically follows that under Florida law, cellular communications are not governed by the Florida wiretap statute. In addressing this issue, the Eleventh Circuit failed to apply and determine these two critical prinicples of Florida law, despite that circuit's precedent holding that in order to determine the validity of wiretap orders obtained by state officials, state law governs to the extent that it is more rigorous than federal law. See *United States v. Domme*, 753

F.2d 950 (11th Cir.1985) and *United States v. Bascaro*, 742 F.2d 1335 (11th Cir.1985), *cert. denied sub nom. Waldrop v. United States*, 472 U.S. 1021, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985), following *United States v. McNulty*, 729 F.2d 1243, 1264 (10th Cir.1984) (en banc) and *United States v. Marion*, 535 F.2d 697 (2d Cir.1976).

The Eleventh Circuit excused the failure of the state officers to have sought a federal court order on the ground that the officers were acting in good faith, although that terminology was not expressly used. The Eleventh Circuit held as follows:

> By obtaining a state court order for the Plasencias' cellular telephone numbers, the police officers were attempting to ensure against any possible violation of Florida's wiretapping laws in the event a combination of cellular and wire transmissions were utilized during the course of an intercepted conversation.

(App.A at 8).

In essence, the Eleventh Circuit has, without any analysis or reference, much less consideration of decisions such as *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (Fourth Amendment exclusionary rule does not apply to evidence obtained by police officers who acted in objectively reasonable reliance upon a search warrant issued by a neutral magistrate but where the warrant was lacking in probable cause) or *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) (extending *Leon* to when officers act in reasonable reliance upon a statute authorizing a warrantless administrative search where the statute is later found to violate the Fourth Amendment), carved a "good faith" exception to violations of the federal wiretap statute. Such a bold ruling warrants consideration on the merits by this Court. Additionally, even if the Eleventh

Circuit's conclusions were correct under federal law, under the applicable Florida law, the officers' good intentions are legally irrelevant. There is no "good faith" exception to the exclusionary provisions of Florida's wiretap statutes. *State v. Garcia*, 547 So.2d 628 (Fla.1989).

The Eleventh Circuit has rendered meaningless the express mandate of Congress that in those states where cellular communications are not protected, application must be made to a federal court. Under the decision below, once any state judge issues a cellular communication interception order, the fruits of the interception are admissible in federal court. Congress never intended such a result and this Court is urged to review the decision.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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DATED: July 22, 1991.

UNITED STATES of America,
Plaintiff, Appellee,

v.

David CARRAZANA, Pablo Carballo, Anselmo Cosio, Carlos Manuel Gonzalez, Jesus Garcia, Raul Z. Plasencia, Maria Elena Plasencia, Miguel Diaz, Defendants-Appellants.

No. 88-5557

United States Court of Appeals,
Eleventh Circuit.

Jan 30, 1991

Appeal from the United States District Court for the Southern District of Florida.

Before JOHNSON and HATCHETT,
Circuit Judges, and DYER, Senior Circuit Judge.

HATCHETT, Circuit Judge.

In this multiple defendant cocaine trafficking case, we affirm the convictions.

FACTS

On March 6, 1987, Eugenio Esteban was found murdered in his automobile in Miami, Florida. Esteban had worked at a gas station owned by Raul Plasencia. After starting work at the station in 1984, Esteban rapidly improved his standard of living, as evidenced by his acquisition of a $65,000 boat and a $50,000 Mercedes-Benz automobile. Initially, the Miami Metro-Dade Police Department's Homicide Division failed to develop any suspects.

On April 2, 1987, homicide investigator Andres Falcon received the first of five telephone calls from an unknown tipster. Based primarily upon these calls, which Detective Falcon and other investigators believed revealed an intimate knowledge of the Esteban homicide and of the criminal activities of Plasencia and his associates, the officers submitted a seventy-six page affidavit to a Florida district court of appeals chief judge and obtained authorization to wiretap land-line telephones located in Raul Plasencia's residence.

The tipster told Detective Falcon that he and Esteban had worked as warehousemen and occasional distributors for an extensive cocaine trafficking organization headed by Plasencia. According to the tipster, Esteban had been murdered because he had failed to compensate the organization for his loss of a hundred kilograms of cocaine with which he had been entrusted. Significantly, the tipster stated that Esteban's killer had carried a .32 caliber semi-automatic PPK handgun--a fact which the police had been careful to keep confidential. The tipster also stated that "Carlito," one of Esteban's executioners, lived at 13255 N.W. 1st Lane. Detective Falcon later learned that the address as given was inaccurate, but that an individual named Carlos Perez resided at 13253 N.W. 1st Lane. Presented with a number of photographs, an eyewitness to the Esteban murder selected the one of Carlos Perez as the one most closely resembling Esteban's murderer. The tipster also identified Pablo Carballo as a principal aide to Plasencia, a fact substantiated six weeks later when the captain of a vessel containing 2,300 pounds of cocaine was found in possession of Carballo's cellular telephone number. Additionally, the tipster stated that Plasencia felt secure within his own mansion and used its communications facilities to direct the organization's narcotics activities.

Based in part upon communications intercepted over those telephones, the detectives sought authorization to electronically tap mobile telephones used by Plasencia and his associates allegedly for conducting criminal conversations. On September 5, 1987, a Florida Supreme Court Justice authorized interception of wire and oral communications occurring over Plasencia's mobile telephones. The electronic surveillance and the investigative activities it

engendered revealed the operations of a large cocaine trafficking organization.

As a result of the investigation, the law enforcement officers concluded that Plasencia was the leader of a criminal enterprise. Maria Elena Plasencia, Raul's wife, was a trusted member in the conspiracy. Carlos Veccio and Pablo Carballo, Maria's brother, acted as lieutenants in the organization. Carlos Perez, together with Maria's brother-in-law, David Carrazana, provided security for the organization, including counter-surveillance activity. Jesus Garcia and Orlando Nunez acted as warehousemen, storing Plasencia's cocaine in their residences, and delivering it as directed by Plasencia or his lieutenants. The surveillance also unmasked customers of the organization, including Miguel Diaz, Anselmo Cosio, and a man known only as John Doe.

On September 7, the officers intercepted a call from Miguel Diaz to Maria Elena Plasencia, Raul's wife, requesting ten "puppies," i.e., ten kilograms of cocaine. Raul Plasencia then called Orlando Nunez to Plasencia's house. From the house, Nunez called Diaz and confirmed the order. Nunez returned home and later delivered the cocaine to Diaz's house where the two met in the driveway. Plainclothes detectives interrupted the sale, announced their identities, seized the cocaine, and then left the scene leaving Nunez and Diaz with the belief that they had been "ripped off" by rival drug dealers or dishonest law enforcement officers.

The officers hoped that continuing electronic surveillance would, in the aftermath of the seizure, provide further information concerning the Plasencia drug network. Indeed, the officers soon intercepted a number of calls between the Plasencias, Nunez, and Carlos Veccio discussing the loss of the cocaine and the need for caution. The officers also monitored conversations arranging a ten kilogram cocaine sale from Plasencia and Veccio to John Doe and his partner, Anselmo Cosio.

On September 8, Veccio met Cosio at Veccio's restaurant. The two then drove separately to Veccio's house and waited in the driveway. Jesus Garcia, who had confirmed the sale with Plasencia

by phone, then arrived. Cosio visually inspected a box in Garcia's car, carried it to his car, and drove away. Plainclothes officers stopped Cosio's car after several miles, seized the box which contained cocaine, but again made no arrests.

On September 14, officers visited Garcia's home and sought consent to search the residence. Garcia declined to permit the search. Upon their departure, the officers saw Garcia drive his car in a frenzied manner to a rear entrance of the house and throw some heavy bags into the trunk of the car. Garcia left in haste, but officers stopped him several blocks away and discovered eighty-six kilograms of cocaine in the trunk of the car.

PROCEDURAL HISTORY

On October 2, 1987, a grand jury returned a five count indictment against the appellants. The grand jury charged Raul and Maria Elena Plasencia in Count 1 with operating a continuing criminal enterprise; the Plasencias, Veccio, Carballo, Carrazana, Diaz, Garcia, and Cosio in Count II with conspiracy to distribute cocaine, and in Counts III through V with possession of cocaine with the intent to distribute it, each possession count corresponding to each of the three seizures.

The appellant (except Cosio who is without standing) moved to suppress the fruits of the wiretaps. After conducting a lengthy evidentiary hearing, the district court denied the motion to suppress.

After seven days of trial, the Plasencias, Carballo, Carrazana, Diaz, and Garcia each entered a guilty plea to one count of possession of cocaine, preserving their right to appeal the district court's denial of their motions to suppress the wiretap evidence. A jury found Veccio guilty as charged and Cosio guilty on the conspiracy count and on one substantive count.

CONTENTIONS

The appellants contend the district court erred in denying the motion to suppress the wiretap evidence.

Cosio contends the evidence was insufficient to support his conspiracy and possession convictions and the district court erred in denying his motion for severance.

Veccio contends the district court erred in permitting the admission of "interpretive" expert testimony and erred by instructing the jury that six of the eight defendants pleaded guilty.

Raul Plasencia contends the government breached his plea agreement by asserting a position at sentencing inconsistent with the terms of the agreement.

ISSUES

The issues are: (1) whether the district court erred in denying the appellants' motion to suppress the wiretap evidence; (2) whether the evidence was insufficient to support Cosio's convictions for conspiracy and possession; (3) whether the district court erred in denying Cosio's motion for severance; (4) whether the district court erred in permitting the admission of expert testimony; (5) whether the district court erred in instructing the jury that certain defendants had pleaded guilty during the trial; and (6) whether the government breached its plea agreement with Raul Plasencia.

DISCUSSION

I. Motion to Suppress

The appellants contend that the district court erred in denying their motion to suppress the introduction of the intercepted cellular phone conversations by determining that: (1) Florida's highest court had lawful authority to approve the monitoring of a mobile telephone; (2) a substantial basis for the issuance of the initial wiretap order existed; (3) alternative investigative techniques were unlikely to succeed and consequently electronic surveillance was necessary; and (4) the initial authorization of a thirty-day wiretap was sufficiently justified.

A. Federal Court Order Requirement

Whether a federal court order is a prerequisite to the lawful interception of communications conducted on cellular telephones is subject to plenary review. See *United States v. Alexander*, 835 F.2d 1406 (11th Cir.1988) (application of law to facts upon review of denial of suppression motion subject to de novo review).

In 1968, Congress preempted the field of interception of wire and oral communications by enacting Title III of the Omnibus Crime Control and Safe Streets Act, Pub.L. 90-351, 82 Stat. 212 (1968) (codified at 18 U.S.C. § 2510 *et seq.*). In 1986, Congress enacted the "Electronic Communications Privacy Act of 1986," Pub.L. 99-508, 100 Stat. 1848 (1986) ("ECPA"). The ECPA amended Title III to protect cellular communications from interception without prior judicial approval.

A special rule accompanied the ECPA to afford those states with wiretap statutes an opportunity to conform to the amendments. Pub.L. 99-508, § 111(b). The rule states that if a state-authorized interception would be valid without regard to the amendments, it would be deemed valid notwithstanding the amendments, if applied within two years of October 21, 1986, and if conducted pursuant to 18 U.S.C. § 2516(2).[1] Title 18 U.S.C.

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[1] Public Law 99-508, § 111(b) provides in full:

> Any interception pursuant to section 2516(2) of title 18 of the United States Code which would be valid and lawful without regard to the amendments made by this title [enacting sections 2521 and 3117 of this title, amending this section and sections 2232, 2511 to 2513, 2516(1)(a), (1)(c), (1)(g) to (l), (2), (3), and 2517 to 2520 of this title, and enacting provisions set out as notes under this section] shall be valid and lawful notwithstanding such amendments if such interception occurs during the period beginning on the date such amendments take effect and ending on the earlier of -
>
> > (1) the day before the date of the taking effect of State law conforming the applicable State statute with chapter 119 of title 18, United States Code, as so amended; or (2) the date two years after the date of the enactment of this Act [Oct. 21, 1986].

18 U.S.C. § 2510 historical note (West Supp. 1990).

§ 2516(2) provides in relevant part:

> The principal prosecuting attorney of any state ... if such attorney is authorized by a statute of that state to make application to a state court judge ... for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for ... an order authorizing, or approving the interception of wire or oral communications.

(West Supp.1990).

In 1987, Florida law did not explicitly provide for judicial authorization of the interception of cellular communications. The appellants contend that the special rule providing for a two year grace period for states whose statutes authorize such an interception, does not apply to the situation in Florida where the state law neither required nor authorized an interception order for cellular communications.[2] The appellants conclude that the wiretap evidence is inadmissible because the law enforcement officers failed to first obtain a federal court order authorizing the interception of cellular telephone conversations as required by law.

The appellants erroneously presume that authorization for a mobile telephone wiretap could not have been sought from the state court because such interceptions could arguably have been accomplished prior to the enactment of the ECPA without any court order. The fact that mobile telephone interceptions might lawfully have been accomplished under Florida law without court order did not preclude the Metro Dade officers from seeking

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[2] In examining the scope of chapter 934, Florida Statutes, the Florida Supreme Court construed "the prohibition of interception of wire communications 'made in whole or in part through the use of facilities for the transmission or communications by the aid of wire ...' to apply only to so much of the communication as is actually transmitted by wire and not broadcast in a manner available to the public." *Dorsey v. State*, 402 So.2d 1178, 1183 (Fla.1981) (police interception of messages broadcast over radio waves to a pocket pager does not require a court order).

judicial authorization for such surveillance. Indeed, in *Dorsey v. State*, the court explicitly declined to decide whether the interception of "land-line telephone messages transmitted in part by wireless signals" would require a wiretap order. 402 So.2d 1178, n. 4. By obtaining a state court order for the Plasencias' cellular telephone numbers, the police officers were attempting to ensure against any possible violation of Florida's wiretapping laws in the event a combination of cellular and wire transmissions were utilized during the course of an intercepted conversation. Thus, the cellular telephone wiretap was not outside the scope of 18 U.S.C. § 2516(2) and was authorized by federal law under the special rule found in Public Law 99-508, § 111(b).

Moreover, even if the officers technically violated federal statutes by not applying for a federal court order, no prejudice resulted. The purpose of the federal legislation was to ensure that surveillance of cellular communications did not occur without following federally mandated procedures or certain prior state court procedures. In this case, the officers followed a state court procedure with virtually identical standards as those found in the federal procedure and any resulting error was harmless.

B. *Probable Cause*

Section 934.09(3)(a), Florida Statutes, requires that issuance of an order authorizing the interception of wire or oral communications must be predicated on a judicial finding of "probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in s. 934.07." (West. Supp. 1990). *Cf.* 18 U.S.C. § 2518(3)(a). The probable cause finding is based upon the "totality of the circumstances," and we review that decision to ensure that the authorization was issued upon a substantial basis for concluding that probable cause existed. *United States v. Nixon*, 918 F.2d 895, 900 (11th Cir.1990) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)).

The determination of an informant's credibility is based upon the "totality of the circumstances," including the traditional review of the basis of his knowledge and reliability. *Gates*, 462 U.S. at

238, 103 S.Ct. at 2332. The *Gates* standard only requires that "major portions" of the informant's statements be verified. 462 U.S. at 246, 103 S.Ct. at 2336. In this case, the tipster gained his information from direct, personal involvement in Plasencia's organization. Over an extended period of time, the tipster provided a vast quantity of detailed information, the principal portions of which were corroborated. The appellants do not confront the volume of uncontested data establishing probable cause to believe that Raul Plasencia was operating a narcotics distribution network. Rather, the appellants contend that the district judge erred in concluding that the issuing court had been presented a fair opportunity to assess the reliability of the tipster, in light of the claim that misrepresentations in the affidavit bolstering the tipster's credibility were intentionally included and impeaching information deliberately omitted.[3] In support of their argument, the appellants list numerous instances in which allegations made in the affidavit are contrasted with the testimony adduced at the evidentiary hearing on the motion to suppress.

An examination of the record, however, belies the appellants' argument. All of the appellants' assertions of error were the subject of factual disputes which were exhaustively reviewed by the district court. The district court carefully considered many witnesses' testimony and assessed their credibility. In its order, the district court rejected all but six claims, finding that those remaining were immaterial and insufficient to counter the incriminating information presented in the affidavit.[4] Moreover,

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[3] Wiretap applications must contain a "full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued...." Fla.Stat.Ann. § 934.09(1)(b) (West Supp.1990); 18 U.S.C. § 2518(1)(b).

[4] The district court found that

> the inaccuracies in the affidavit which the Defendants have established are references to Agent Grassman's having told Detective Parr that two confidential informants identified Plasencia and Carballo as involved in drug smuggling, when Agent Grossman [sic] now recalls having mentioned only one; the dates of the Rios and Carballo interviews,

the affidavit reveals instances where the affiants were careful to inform the issuing judge that the tipster had provided information that had not or could not be corroborated.[5]

The district court's underlying factual findings are reviewable under the clearly erroneous standard. *United States v. Wuagneux*, 683 F.2d 1343, 1355 (11th Cir. 1982), *cert. denied*, 404 U.S. 814, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983). The claims of error which were proven were properly deemed immaterial, and the district court properly found that the court issuing the initial wiretap had a substantial basis for its probable cause finding.

C. *Alternative Investigative Means*

An application for an order authorizing the interception of wire communications must include "[a] full and complete statement as to whether or not other investigative procedures had been tried and failed or why they reasonably appear to be unlikely to succeed if

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which occurred on March 16 rather than May 16; the date of Detective Parr's unsuccessful surveillance of the Plasencia residence which occurred on April 12, but which is variously reported to have taken place on May 21 and June 21; and the date on which the tipster called while Detective Falcon was out of town, which was reported as April 23, when in fact it was April 28. Additionally, Detective Falcon, in testimony at the suppression hearing, revised his statement of prior experience in wiretap cases to reflect his having acted once as a monitor and another time as a surveillance agent, rather than having acted twice as a monitor, as the affidavit states. Finally, while the evidence is not conclusive, the Court would find that on the evening of April 21, Detective Falcon saw a dark car in the Plasencia compound which only appeared to be a Mercedes, but which he could not positively identify as such.

[5] For example, the affiants openly reported that the tipster gave them an inaccurate address for the residence of Carlos Perez. They also stated that the tipster insisted that Plasencia's operations were protected by various corrupt police officers, though no official wrongdoing was ever detected. The affidavit also revealed other allegations of the tipster which were not confirmed after subsequent police investigation.

tried or to be too dangerous." Fla.Stat.Ann. § 934.09(1)(c) (West. Supp.1990); 18 U.S.C. § 2518(1)(c). The appellants contend that the district court erred in concluding that the affidavit and its supporting evidence demonstrated that less intrusive investigative methods were unlikely to succeed.

An expert witness for the appellants testified that stationary surveillance could easily have been accomplished of the Plasencia residence. Yet, the expert was unaware of the counter surveillance measures which Plasencia had in place, and he conceded that counter surveillance would affect the type of observations which could successfully be undertaken. In fact, high walls encircling the Plasencia residence and security cameras sweeping the surrounding area hindered stationary observation of the compound. The affidavit recites that on some forty-nine occasions attempts to determine what cars had entered the Plasencia compound were unsuccessful.

The appellants also contend that the affidavit failed to specify how stationary surveillance of a score of other residential and business premises suspected of involvement with the organization under investigation had been tried and failed or why it was unlikely to succeed if tried. The affidavit, however, does state that several attempts were made to follow Carballo and on each occasion he engaged in evasive maneuvers which frustrated the attempts to follow him. Likewise, efforts to conduct physical surveillance of Carballo's residence and of suspected cocaine storage sites were unsuccessful.

The appellants assert that during the four and one-half month investigation, the officers should have cultivated the apparently well-connected tipster into a confidential informant for use in an undercover investigation. The officers, however, should not be faulted for failing to unmask the tipster. His calls were unannounced and generally of short duration. The tipster sought to conceal his identity and acted accordingly. Even if the tipster had been identified, one cannot presume that he would have agreed to act as an informant given his fear of the Plasencia organization.

The appellants also contend the law enforcement officers failed

to attempt any infiltration of the organization though undercover agents, failed to execute search warrants at any of the premises suspected of containing cocaine, failed to subpoena any of the persons suspected of being involved in the organization to testify before the grand jury, and failed to offer immunity or protective services of the government to any of these potential witnesses. These arguments were fully presented to the district court which properly concluded that none of the alternative techniques suggested would have been feasible.

It is true that "'we must be careful not to permit the government merely to characterize a case as a "drug conspiracy" that is therefore inherently difficult to investigate. The affidavit must show with specificity why in *this particular investigation*, ordinary means of investigation will fail.'" *United States v. Ippolito*, 774 F.2d 1482, 1486 (9th Cir.1985) (quoting *United States v. Robinson*, 698 F.2d 448, 453 (D.C.Cir. 1983) (per curiam) (emphasis in original)). The necessity for electronic eavesdropping in this case was considered in light of the demonstrated futility of alternative means of investigation. The district court did not err in concluding that electronic interception was a necessary tactic in this criminal investigation. See *United States v. Van Horn*, 789 F.2d 1492, 1496-97 (11th Cir.), *cert. denied*, 479 U.S. 855, 107 S.Ct. 192, 93 L.Ed.2d 124 (1986).

D. *Thirty Day Duration of Wiretap Authorization*

If a wiretap order authorizes electronic surveillance to continue after the first interception of a communication of the type sought, the application must contain "a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter." Fla.Stat.Ann. § 934.09(1)(d) (West Supp.1990); 18 U.S.C. § 2518(1)(d).

The initial wiretaps on the Plasencias' phones were authorized to continue beyond interception of the first incriminating conversations up to a period of thirty days. The appellants contend that this portion of the order was based on the affiants' conclusory allegation that "the nature of this investigation is such that the

court's authorization for interception should not automatically terminate when the type of communications described [above] have first been obtained." According to the appellants, the affiants failed to make the necessary showing of a particular description of facts establishing probable cause.

Contrary to the appellants' assertions, given the complexity of the case as fully set forth in the affidavit, we find abundant probable cause existed to justify the thirty day duration of the initial wiretap authorization. The affidavit alleged the existence of a complex, continuing narcotics conspiracy involving many persons, each performing specialized tasks within the criminal organization. The expressed objectives of the investigation were to assemble evidence of this wrongdoing. Probable cause existed to lead one to believe that more than a single relevant conversation would take place or even a limited and discrete series of relevant conversations. *See, e.g., United States v. Sklaroff*, 323 F.Supp. 296, 306-07 (S.D.Fla.1971), *aff'd*, 506 F.2d 837 (5th Cir.), *cert. denied*, 423 U.S. 874, 96 S.Ct. 142, 46 L.Ed.2d 105 (1975).

II. Sufficiency of the Evidence

To determine whether sufficient evidence supports Cosio's convictions for conspiracy and possession, we review the evidence in the light most favorable to the government and consider whether a reasonable jury could find it proves Cosio's guilt beyond a reasonable doubt. *United States v. Sanchez*, 722 F.2tl 1501, 1505 (11th Cir.), *cert. denied*, 407 US. 1208, 104 S.Ct. 2396, 81 L.Ed.2d 353 (1984).

In order to sustain Cosio's conviction for conspiracy, we must determine if the evidence established that a conspiracy existed, and that, with an understanding of its essential objective, Cosio voluntarily became a part of it. *United States v. Lee*, 695 F.2d 515, 517 (11th Cir.), *cert. denied*, 464 U.S. 839, 104 S.Ct. 130, 78 L.Ed.2d 125 (1983). The requisite proof may be established by circumstantial evidence, or by inferences to be drawn from the conduct of an individual or his confederates. *United States v. Bascaro*, 742 F.2d 1335, 1359 (11th Cir.1984), *cert. denied*, 472 U.S. 1017, 105 S.Ct. 3476, 87 L.Ed.2d 613 (1985).

According to Cosio, other than his one isolated act of retrieving cocaine from Garcia's car in Veccio's driveway, no evidence shows Cosio to have had any connection with any of the other co-defendants. Cosio contends that this evidence alone is insufficient to link him to the conspiracy.

Cosio's argument omits proof at trial which revealed an agreement by Veccio to distribute ten kilograms of cocaine to John Doe and his partner, Cosio. Intercepted phone conversations revealed that Doe could not take delivery of the cocaine at the time arranged, so he informed Veccio that his associate, Cosio, could pick up the cocaine. Doe assured Veccio that Veccio knew Cosio, and after conceding that he was acquainted with Cosio, Veccio agreed to deliver the cocaine to Cosio. During the course of phone calls, Doe referred to Cosio as his "partner."

Based upon the foregoing, we conclude that the jury was entitled to find that Cosio had entered the conspiracy. His activity consisted of planning the pickup of a large quantity of cocaine, personal execution of the delivery, and a readiness to discuss its consequences. Even if Cosio's participation is viewed as a single act of retrieving ten kilograms of cocaine, the jury could presume that Cosio was familiar with the prior illicit activities of both Doe and Veccio, and infer his knowledge of the broader, ongoing conspiracy. Cosio's conduct was sufficient to implicate him in the conspiracy. *See United States v. Hawkins*, 661 F.2d 436, 454 (5th Cir.1981), *cert. denied*, 456 U.S. 991, 102 S.Ct. 2274, 73 L.Ed.2d 1287 (1982).[6]

III. Severance Motion

Severance is warranted where the joinder of defendants in a trial together results in compelling prejudice. *United States v. Marszalkowski*, 669 F.2d 655, 660 (11th Cir.), *cert. denied*, 459

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[6] Because we do not believe Cosio's conspiracy conviction should be set aside for insufficient evidence, we do not address his argument that his conviction for possession must be remanded for a new trial because his trial upon the possession charge was tainted by evidence relating to his involvement in the conspiracy.

U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 167 (1982). If the jury cannot keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to each, severance should be granted. *Marszalkowski*, 669 F.2d at 660. Cosio contends that the district court erred in denying his motion for severance because the admission of the wiretap evidence against Veccio deprived Cosio of his right to a fair trial. Through severance relief, Cosio claims that he would have received a trial free from the prejudicial effects associated with the wiretap evidence against Veccio.

Cosio's argument is conclusory and fails to explain how severance would have prevented his jury from being exposed to the "prejudicial" evidence. The wiretap evidence against Veccio would have been admissible under Federal Rule of Evidence 801(d)(2)(E) in its entirety against Cosio even at a separate trial because Veccio's conversations constitute statements of a co-conspirator made in furtherance of the conspiracy.[7] Cosio has identified no evidence not admissible against him at a separate trial, much less evidence of such a specific and compelling prejudice as to mandate a severance. Accordingly, the district court did not abuse its discretion in denying Cosio's motion for severance.

IV. Expert Testimony

The district court has broad discretion in admitting or excluding expert testimony. The court's decision is to be sustained on appeal unless it is manifestly erroneous. *United States v. Brown*, 872 F.2d 385, 392 (11th Cir.), *cert. denied*, ___ U.S.___, 110 S.Ct. 253, 107 L.Ed.2d 203 (1989). Veccio contends that the district court improperly permitted Sergeant Carlos Gonzalez of the Metro-Dade Police Department to testify to his understanding of certain code words or phrases overheard in the intercepted conversations and to further testify as to the identities of individuals referred to by nickname in certain calls.

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[7] Federal Rule of Evidence 801(d)(2)(E) provides that "[a] statement is not hearsay if ... [t]he statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." (West Supp.1990).

Federal Rule of Evidence 702 states that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." (West 1984). Veccio contends that Sergeant Gonzalez had no specialized training in the use of codes and had never before been qualified as an expert. At the time of trial, Sergeant Gonzalez had been a police officer for twelve years in the Metro-Dade Police Department, had investigated numerous narcotics cases, and is a native Spanish speaker with an understanding of slang peculiar to the Cuban dialect. From the monitoring's inception, he supervised and coordinated the efforts of the agents intercepting the calls with the police surveillance teams. He worked twelve-hour shifts in the monitoring outposts and overheard the conversations as they were intercepted. He also listened to significant calls that occurred while he was off duty.

Law enforcement officers may testify as to the meaning of slang or code words. *United States v. Brown*, 872 F.2d at 392 (agent properly permitted to testify that defendant's use of terms "paper," "candy," and "dresses" were references to cocaine). Veccio contends that while a qualified expert may testify in a limited fashion about codes, it is impermissible to allow interpretive testimony of the sort at issue in this case. *United States v. White*, 569 F.2d 263, 267 n. 4 (5th Cir.), *cert. denied*, 439 U.S. 848, 99 S.Ct. 148, 58 L.Ed.2d 149 (1978). See also *United States v. Dicker*, 853 F.2d 1103, 1108 (3d Cir.1988). Veccio contends that the clearest example of the improper admittance of Gonzalez's testimony occurred in permitting his interpretation of the word "family" in several calls. Despite the fact that the district court initially struck from the record Sergeant Gonzalez's translation of this word as meaning "cocaine," the prosecutors continued to point out when the word "family" appeared in conversations until they prevailed in eliciting the testimony previously found to be improper.

After carefully reviewing the record, we conclude that even if it was improper to admit Sergeant Gonzalez's testimony concerning certain code words or phrases, and other instances wherein

Sergeant Gonzalez set forth the identity of an individual referred to by nickname, Veccio is not entitled to prevail on appeal because the error was harmless beyond a reasonable doubt. *See United States v. Turner*, 871 F.2d 1574, 1581 (11th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 552, 107 L.Ed.2d 548 (1989). Aside from Sergeant Gonzalez's testimony, overwhelming independent evidence was presented concerning Veccio's involvement in the drug conspiracy sufficient to negate any reasonable doubt as to whether the error contributed to his conviction.

V. The Jury Instruction

After seven days of trial, six defendants entered pleas of guilty outside the presence of the jury. Veccio and Cosio continued with their joint trial. They made no motion for a mistrial. At their request, the court advised the jury according to an instruction prepared by the defense as to the reason for the sudden absence of the other defendants in the case. On appeal, Veccio contends that although he requested the charge, it constituted plain error and requires that his conviction be reversed.

To the contrary, the fact that a co-conspirator's guilty plea was made known to the jury will rarely result in plain error even when no cautionary instruction is given. *United States v. King*, 505 F.2d 602, 608 (5th Cir.1974).[8] In the absence of aggravated circumstances, a cautionary instruction directing the jury not to consider a guilty plea as substantive evidence of guilt will sufficiently cure any potential for prejudice to the defendant on trial. *United States v. Baete*, 414 F.2d 782, 783-84 (5th Cir.1969). The instruction given in this case plainly directed the jury not to consider the co-defendants' guilty pleas as substantive evidence against appellants. The comprehensive instructions given were sufficient to remove any prejudice which might otherwise have flowed from the jury's knowledge that six co-defendants had pleaded guilty.

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[8] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), the court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

Moreover, because Veccio caused the evidence of the co-defendant's guilty plea to be presented as a tactical trial decision, he waives any claim of error on appeal. *United States v. Cook*, 461 F.2d 906, 910-11 (5th Cir.), *cert. denied*, 409 U.S. 949, 93 S.Ct. 269, 34 L.Ed.2d 219 (1972). Veccio made a deliberate tactical decision in requesting that the jury be informed that the co-defendants had entered pleas of guilty. Indeed, over the government's objections, Veccio requested that the jury be told specifically to which count each defendant had pleaded guilty.

VI. Prosecutorial Misconduct

"When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). Moreover, the court must use objective standards to determine the disputed terms of the plea agreement. *In re Arnett*, 804 F.2d 1200, 1202 (11th Cir.1986). Raul Plasencia pleaded guilty to Count III of the five count indictment which charged Plasencia with possession with intent to distribute cocaine. In exchange for Plasencia's guilty plea, the government promised to dismiss with prejudice the remaining counts of the indictment at the time of sentencing. The government also promised to make no recommendation as to the quality or quantum of punishment.

Plasencia contends that the government breached its agreement when in response to defense counsel's recommendation that the court impose a twenty year sentence, the prosecutor commented:

> I think, Your Honor, for Mr. Cagney to suggest the court put twenty years as an appropriate sentence under these circumstances they are, Your Honor, with respect to the relevant culpability of the other defendants; let me say we can't believe the level of this comparison to any defendant, whether they went to trial or pled out.
>
> Your Honor, Mr. Plasencia was the kingpin in this organization. It was clearly his organization....

Plasencia contends that the prosecutor's statement amounts to disparaging criticism of the recommended twenty year sentence, and reads like an abbreviated but emphatic closing statement urging the court to find the defendant guilty of managing a continuing criminal enterprise in violation of 21 U.S.C. § 848.

The government, however, expressly reserved in the plea agreement the right to inform the court and the probation department of all facts relevant to the sentencing process. The dismissal of the continuing criminal enterprise count as part of the plea bargain did not preclude the government from characterizing Plasencia as the ringleader or principal in the offense. "It is acceptable to consider evidence of crimes for which defendant has been indicted but not convicted. Activities for which there has been no charge filed can be considered as well." *Tucker v. Kemp*, 702 F.2d 1480, 1487 (11th Cir.) (en banc), *vacated*, 474 U.S. 1001, 106 S.Ct. 517, 88 L.Ed.2d 452 (1985), *reinstated*, 802 F.2d 1293 (1986), *cert. denied*, 480 U.S. 911, 107 S.Ct. 1359, 94 L.Ed.2d 529(1987). The prosecutor's statement concerning Plasencia's leading role in the offense was relevant to the sentencing process. The government never agreed that Plasencia was not the "kingpin" or that it would refrain from characterizing him as such. Consequently, the prosecutor's statement was not a breach of Plasencia's plea agreement.

CONCLUSION

For the reasons stated above, we affirm the appellants' convictions and sentences.

AFFIRMED.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5557

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

May 24, 1991
MIGUEL CORTEZ CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID CARRAZANA, PABLO CARBALLO, CARLOS MANUEL GONZALEZ, JESUS GARCIA, RAUL Z. PLASENCIA,
MARIA ELENA PLASENCIA, and
MIGUEL DIAZ,

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion___, 11th Cir., 19,___, ____F.2d____

Before: JOHNSON and HATCHETT., Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having reguested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the reguest of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having reguested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-699-Cr-KEHOE

UNITED STATES OF AMERICA

v.

RAUL Z. PLASENCIA, ET. AL.,

DEFENDANTS.

_____/

PLEA AGREEMENT

The United States of America and the defendant, RAUL Z. PLASENCIA, do hereby enter into the following Plea Agreement pursuant to Rule 11 (e) of the Federal Rules of Criminal Procedure:

1. The defendant, RAUL Z. PLASENCIA, agrees to plead guilty to Count III of indictment No. 87-699-Cr-KEHOE. That Count charges violations of Title 21, United States Code, Section 841(a)(1), and is punishable by a mandatory minimum sentence of 10 years imprisonment and a maximum sentence of life imprisonment. The Court may also impose a fine of up to $4,000,000, and a period of supervised release of not less than five (5) years.

2. The United States agrees to dismiss with prejudice the remaining counts of indictment no. 87-699-Cr-KEHOE at time of sentencing.

* * *

9. The United States agrees to make no recommendation as to the quality or quantum of punishment, but reserves the right to inform the Court of all facts pertinent to the sentencing process as well as the right to supply the Court's probation officer with all relevant information concerning the defendant, including his background.

RESPECTFULLY SUBMITTED,

LEON KELLNER
UNITED STATES ATTORNEY

DATE: 7-5-88 BY: _____
STEPHEN SCHLESSINGER
Assistant United States Attorney

DATE: 7/5/88 _____
WILLIAM P. CAGNEY, III, ESQUIRE
Attorney for Defendant R. Plasencia

DATE: 7/5/88 _____
RAUL Z. PLASENCIA
Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

PRESENTENCE REPORT

PLASENCIA, RAUL

* * *

Codefendant Information. Based on interview with Assistant U.S. Attorney Stephen Schlessinger, the following is a description of both the respective roles and relative culpability of all codefendants involved in the instant offense:

RAUL Z. PLASENCIA, operated a continuing criminal enterprise in which he directed, managed and supervised a large number of individuals involved in drug trafficking. He amassed substantial income from these narcotic activities.

* * *

According to government officials, Raul Plasencia operated a continuing criminal enterprise in which he directed, managed and supervised a large number of individuals involved in drug trafficking. In only three days, undercover agents were able to seize the equivalent of 106 kilograms of cocaine from the Plasencia organization.

The defendant arrived in the United States on a boat with his wife and several codefendants in 1979. Within the next nine years he was able to amass an incredible amount of wealth and property in the South Florida area. However, there appears to be no credible evidence which would indicate that the defendant achieved this economic standing through means other than criminal activity. Clearly, Raul Z. Plasencia, fits the profile of a major drug dealer.

His involvement in this offense was deliberate, willful and motivated by insatiable greed. He committed these crimes in a community which for some time has been overwhelmed with such activity. Mr. Plasencia has little if any regard for the laws of this country and the safety of the community. For his involvement it is felt that a significant and lengthy term of imprisonment is warranted.

SENTENCING DATA

(As provided by the Administration Office of the U.S.Courts for a twelve month Period ending June 30, 1998)

* * *

	NATIONAL	S/D FLORIDA
Average Sentence of Imprisonment:	67 months	71 months

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

V.

JUDGMENT IN
A CRIMINAL CASE
Case Number 87-699-
CR-KEHOE

RAUL Z. PLASENCIA,
M.C.C., 15801 S.W. 137th AVE.
MIAMI, FL.

* * *

IT IS THE JUDGMENT OF THIS COURT THAT:

defendant is hereby committed to the custody of the Attorney General for a period of FIFTY (50) YEARS followed by a supervised release term of FIVE (5) YEARS. It is further

ORDERED AND ADJUDGED that defendant pay a fine of $250,000. as directed by the U. 5. Probation Department.

_____
U.S. DISTRICT JUDGE